Supreme Court, U. S.
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No. 80-377

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

AGNES VOGEL,
Appellant

v.

JAMES L. ROBISON and BERNARD J. VOGEL,
Appellees.

On Appeal From The Supreme Court of the State of Illinois

MOTION OF APPELLEE BERNARD J. VOGEL TO DISMISS OR AFFIRM

ANDREW J. O'CONOR
130 East Madison Street
Ottawa, Illinois 61350
(815) 434-6206

SANFORD R. GAIL
150 North Wacker Drive
Chicago, Illinois 60606
(312) 782-1905

Of Counsel:

A. BRUCE WHITE
150 North Wacker Drive
Chicago, Illinois 60606
(312) 782-1905

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Question Presented

Whether the Illinois statute prohibiting a husband or wife from suing the other for tort to the person committed during coverture violates the Equal Protection Clause of § 1 of the Fourteenth Amendment to the Constitution of the United States.

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AGNES VOGEL, *Appellant* v. **JAMES L. ROBISON and BERNARD J. VOGEL,** *Appellees.*	On Appeal From The Supreme Court of the State of Illinois

MOTION OF APPELLEE BERNARD J. VOGEL TO DISMISS OR AFFIRM

MOTION OF APPELLEE BERNARD J. VOGEL TO DISMISS OR AFFIRM

Appellee Bernard J. Vogel moves this Court, pursuant to Supreme Court Rule 16, to dismiss the appeal herein or, in the alternative, to affirm the Order of the Supreme Court of Illinois entered on May 29, 1980, which denied Appellant leave to appeal from the Order of the Appellate Court of Illinois, Third District, on January 15, 1980, on the ground that the appeal does not present a substantial federal question.

OPINION BELOW

The opinion of the Appellate Court of Illinois, Third District, in Cause No. 79-318, which affirmed the Order of the Circuit Court of LaSalle County dismissing the complaint of Agnes Vogel as to her husband Bernard J. Vogel is reported at 80 Ill.App.3d 312, 399 N.E.2d 688 (1980), and is set forth in the Appellant's Appendix at page A-3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Equal Protection Clause of § 1 of the Fourteenth Amendment to the Constitution of the United States:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*" (emphasis added).

This case also involves the common law doctrine of interspousal tort immunity as adopted by the Illinois legislature and embodied in Ill. Rev. Stat. 1977, ch. 40 par. 1001:

> "A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; *provided, that neither husband nor wife may sue the other for a tort to the person committed during coverture.* An attachment or judgment in such action may be enforced by or against her as if she were a single woman." (emphasis added).

STATEMENT OF THE CASE

On December 2, 1976, Appellant and Appellee were husband and wife. On that date, Appellant Agnes Vogel was a passenger in an automobile operated by her husband, Bernard J. Vogel, when that automobile collided with an automobile driven by Defendant James J. Robison. On November 22, 1978, Appellant filed a complaint against her husband and Defendant Robison for damages allegedly incurred as a result of the automobile collision.

Appellee Bernard J. Vogel moved to dismiss all counts against him contending that the actions were barred by the Illinois statute which embodies the common law doctrine of interspousal immunity and prohibits a husband or wife from suing the other for tort to the person committed during coverture. Ill. Rev. Stat. 1977, ch. 4 par. 1001. The motion was granted and the order of the Circuit Court of LaSalle County, Illinois, dismissing the complaint of Agnes Vogel as to Bernard J. Vogel with prejudice was entered February 15, 1979.

On appeal to the Third District of the Appellate Court of Illinois, Agnes Vogel admitted that Ill. Rev. Stat. 1977, ch. 40 par. 1001 would, if applied to the facts of the case, bar her action because she alleged a tort committed during coverture. 399 N.E.2d at 689. She asked the Court to find the statute unconstitutional under the equal protection clauses of the United States and Illinois constitutions.

The Appellate Court affirmed the Circuit Court on January 15, 1980, finding that the statute had withstood all prior constitutional challenges. The statute had been upheld twice on due process grounds (*Heckendorn* v. *First National Bank of Ottawa,* 19 Ill.2d 190, 166 N.E.2d 571 *cert. den.* 364 U.S. 882 (1960); *Wartell* v. *Formusa,* 34 Ill.2d 57, 213 N.E.2d 544 (1966)) and twice on equal protection grounds (*Steffa* v. *Stanley,* 39 Ill.App.3d 915, 350 N.E.2d 886 (1976); *Tyrken* v. *Tyrken,* 63 Ill.App.3d 199, 379 N.E.2d 804 (1978)). In both of

the equal protection cases, the Illinois Supreme Court denied petitions for leave to appeal.

On May 29, 1980 the Illinois Supreme Court also denied Agnes Vogel's petition for leave to appeal in this case, and this appeal followed.

Agnes Vogel's action against Defendant Robison is currently pending in the Circuit Court of LaSalle County, Illinois.

SUMMARY OF ARGUMENT

At common law one spouse could not maintain a legal action against the other to recover for a tort against the person committed during coverture. *Thompson* v. *Thompson,* 218 U.S. 611 (1910). In response to a movement by the states to change the common law rule through married women's statutes, this Court held that such statutes would not abrogate common law interspousal tort immunity in the absence of a clear and plain statement of legislative intent. *Id.*

Rather than abandon the common law doctrine, the Illinois legislature chose to explicitly confirm interspousal tort immunity as the law of Illinois. Ill. Rev. Stat., ch. 40, par. 1001. In addition to Illinois, at least twenty-four other jurisdictions follow the common law rule.

The Illinois statute has consistently withstood constitutional challenges on both due process and equal protection grounds. *Heckendorn* v. *First National Bank of Ottawa,* 19 Ill.2d 190, 166 N.E.2d 571, *cert. den.* 364 U.S. 882 (1960); *Wartell* v. *Formusa,* 34 Ill.2d 57, 213 N.E.2d 544 (1966); *Steffa* v. *Stanley,* 39 Ill.App.3d 915, 350 N.E.2d 886 (1976); *Tyrken* v. *Tyrken,* 63 Ill.App.3d 199, 379 N.E.2d 804 (1978); *Vogel* v. *Robison,* 80 Ill.App.3d 312, 399 N.E.2d 688 (1980).

Interspousal tort immunity has also withstood federal equal protection challenges in every other federal and state court that has considered the issue. *Alfree* v. *Alfree,* Del.Supr.,

410 A.2d 161 (1979), *appeal dismissed,* ____ U.S. ____, 100 S.Ct. 2145 (1980); *Paiewonsky* v. *Paiewonsky,* 466 F.2d 178 (3d. Cir. 1971), *cert. denied,* 405 U.S. 919 (1972); *Locklair* v. *Locklair,* 256 F.Supp. 530 (D.S.C. 1966); *Brawner* v. *Brawner,* Mo.Supr. 327 S.W.2d 808 (1959); *Smith* v. *Smith,* 240 Pa Super.

The recent appeal to this Court in *Alfree* v. *Alfree* raised the same issues presented by this appeal, and was dismissed for want of a substantial federal question.

Contrary to Appellant's contention, the interspousal immunity doctrine embodied in Ill. Rev. Stat., ch. 40, par. 1001 does not interfere with the right of marriage. *Califano* v. *Jobst,* 434 U.S. 47 (1977); *Zablocki* v. *Redhail,* 434 U.S. 374 (1978); *Mapes* v. *United States,* 576 F.2d 896 (Ct. Cl. 1978), *cert. den.,* 439 U.S. 1046 (1978). Consequently, the Illinois statute is not to be subjected to rigorous scrutiny.

When viewed by other than the strict scrutiny standard, it is clear that the State of Illinois' interest in promoting domestic tranquility is sufficiently compelling to support the classification in question. Recently, this state interest was resoundingly reaffirmed by the Illinois Supreme Court in *Hewitt* v. *Hewitt,* 77 Ill.2d 49, 394 N.E.2d 1204 (1979).

Accordingly, this appeal, like the appeal to this Court in *Alfree* v. *Alfree,* should be dismissed or summarily affirmed because it fails to present a substantial federal question.

ARGUMENT

A.

The Illinois Statute Preventing One Spouse From Suing The Other Spouse In Tort Reflects The Clear Intent Of The Illinois Legislature To Follow The Common Law Rule.

At common law one spouse could not maintain a legal action against the other to recover for a tort against the person committed during coverture. In *Thompson* v. *Thompson,* 218 U.S. 611 (1910), where this Court upheld the dismissal of a wife's tort action against her husband on the basis of the interspousal immunity doctrine then extant in the District of Columbia, the common law rule was recognized as follows:

> "At the common law the husband and wife were regarded as one,—the legal existence of the wife during coverture being merged in that of the husband; and generally speaking, the wife was incapable of making contracts, of acquiring property or disposing of the same without her husband's consent. They could not enter into contracts with each other, nor were they liable for torts committed by one against the other." 218 U.S. at ____.

Beginning in the mid-nineteenth century, a trend began to change the common law by means of state married women's statutes. These statutes were intended to secure a separate legal estate for women based on the equitable separate estate doctrine, and their chief effect was to create substantive rights in the wife to protect her property. McCurdy, *Personal Injury Torts Between Spouses,* 4 Vill. L.Rev. 303, 308-313 (1959). Ultimately, married women's statutes were passed in every jurisdiction.

This Court has made it clear, however, that such statutes would not abrogate common law interspousal tort immunity in the absence of a clear and plain statement of legislative intent. In *Thompson* v. *Thompson, supra,* this Court had before it the Married Women's Act of the District of Columbia. The Court held that the language of the Act did not change the common

law rule; and therefore a wife could not maintain a personal tort action against her husband:

> It must be presumed that the legislators who enacted this statute were familiar with the long-established policy of the common law, and were not unmindful of the radical changes in the policy of centuries which such legislation as is here suggested would bring about. Conceding it to be within the power of the legislature to make this alteration of the law, if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention. *Had it been the legislative purpose not only to permit the wife to bring suits free from her husband's participation and control, but to bring actions against him also for injuries to person or property as though they were strangers, thus emphasizing and publishing differences which otherwise might not be serious, it would have been easy to have expressed that intent in terms of irresistible clearness.* 218 U.S. at 618 (emphasis added).

Rather than abolish common law interspousal tort immunity, the Illinois legislature clearly and unequivocally confirmed the common law rule as the law of Illinois by expressly prohibiting personal tort actions by one spouse against another.

The key developments in the Illinois Married Women's Act in the 1860's and 1870's are aptly summarized as follows:

> The Married Women's Acts of the 1860's altered the common law by conferring upon the married woman the right to bring suit. The Act of 1861 (Laws 1861, p. 143, § 1), by implication enabled the married woman to bring actions, against third persons as well as her husband, to assert her separate property rights. *Emerson* v. *Clayton,* 32 Ill. 493 (1863). The Act of 1869 explicitly allowed for support and maintenance actions to be brought by a married woman living apart from her husband without fault. Laws 1869, p. 439, § 6. The Act of 1869 also provided that a married woman could sue for her earnings. Laws 1869, p. 440, § 13.

> The Husband and Wife Act of 1874 for the first time established the general right of the married woman to sue and be sued. Ill. Rev. Stat. ch. 68, § 1 (1874). The provision enabling the enforcement of an attachment or judgment, by or against the married woman, gave substance to the right to sue and be sued. The current statute retains this same provision. S.H.A. 1980, ch. 40, par. 1001, Hist. and Prac. Note at p. 180.

The 1874 Act did not explicitly deal with the issue of interspousal immunity. The viability of the doctrine under the 1874 Act was first before the Illinois Supreme Court in *Brandt* v. *Keller,* 413 Ill. 503, 109 N.E.2d 729 (1953). The Court recognized the common law rule that a wife cannot sue her husband:

> "At common law a married woman had no separate identity before the law; she was regarded as a chattel with neither property or other rights against anyone, for her husband owned all her property and asserted all her legal and equitable rights (*Snell* v. *Snell,* 123 Ill. 403, 407 et seq.; *Hoder* v. *Boggs,* 63 Ill. 161.) As a consequence of this status, which was founded upon the prevailing feudal economy, the rule evolved that the husband was immune to all suits by his wife, including actions for personal injuries he might inflict upon her." 413 Ill. at 505, 109 N.E.2d at 730.

The Court went on to hold that the 1874 Act abrogated the common law rule, interpreting a married woman's right to "in all cases sue and be sued" (Ill. Rev. Stat. 1951, ch. 68, par. 1) as an authorization for her to bring a tort action against her husband.

Mindful of the effect of the decision in *Brandt* v. *Keller,* the Illinois legislature at its next session amended the Married Women's Act by adding the proviso which expressly restored interspousal immunity as the rule of law in Illinois:

> A married woman may, in all cases, sue and be sued without joining her husband with her, to the same extent as if she were unmarried; *provided, that neither husband nor*

wife may sue the other for a tort to the person committed during coverture. An attachment or judgment in such action may be enforced by or against her as if she were a single woman. Ill. Rev. Stat. 1953, ch. 68, par. 1[1] (emphasis added).

Since the 1953 amendment, Illinois courts have uniformly followed the legislature's mandate and have barred tort actions between spouses. *Heckendorn* v. *First National Bank of Ottawa,* 19 Ill.2d 190, 166 N.E.2d 571, *cert. den.* 364 U.S. 882 (1960); *Wartell* v. *Formusa,* 34 Ill.2d 57, 213 N.E.2d 5644 (1966); *Steffa* v. *Stanley,* 39 Ill.App.3d 915, 350 N.E.2d 886 (1976); *Tyrken* v. *Tyrken,* 63 Ill.App.3d 199, 379 N.E.2d 804 (1978); *Vogel* v. *Robison,* 80 Ill.App.3d 312, 399 N.E.2d 688 (1980).

In addition to Illinois, at least 24 other jurisdictions follow the common law rule of interspousal immunity and preclude tort actions, in whole[2] or in part,[3] between spouses. Further-

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[1] This statute has not been further amended since 1953. Recently, however, the entire Husband and Wife Act was transferred and recodified from Ill. Rev. Stat., ch. 68, par 1 *et seq.* to Ill. Rev. Stat. ch. 40, par. 1001 *et seq.,* and paragraph 1 was renumbered Ill. Rev. Stat., ch. 40, par. 1001.

[2] *Thompson* v. *Thompson,* 218 U.S. 611 (1910) (District of Columbia); *Burns* v. *Burns,* 111 Ariz. 178, 526 P.2d 717 (1974); *Ferguson* v. *Davis,* 48 Del. 299, 102 A.2d 707 (1954); *Webster* v. *Snyder,* 103 Fla. 1131, 138 So. 755 (1932); *Wright* v. *Wright,* 85 Ga.App. 721, 70 S.E.2d 152 (1952); *Sink* v. *Sink,* 172 Kan. 217, 239 P.2d 933 (1952); *Edwards* v. *Royal Indem. Co.,* 182 La. 171, 161 So. 191 (1935); *Austin* v. *Austin,* 136 Miss. 61, 100 So. 592 (1924); *Conley* v. *Conley,* 92 Mont. 425, 15 P.2d 922 (1932); *DiGirolamo* v. *Apanavage,* 454 Pa. 557, 312 A.2d 382 (1973); *McKelvey* v. *McKelvey,* 111 Tenn. 388, 77 S.W. 664 (1903); *Rubalcava* v. *Gisseman,* 14 Utah2d 344, 384 P.2d 389 (1963); *Paiewonsky* v. *Paiewonsky,* 466 F.2d 178 (3d Cir. 1978) (Virgin Islands), *cert. den.,* 405 U.S. 919 (1972); *McKinney* v. *McKinney,* 59 Wyo. 204, 135 P.2d 940 (1943); Haw. Rev. Stat. § 573-5 (1976).

[3] Some courts have abrogated interspousal tort immunity as applied to intentional torts only. *See Lusby* v. *Lusby,* 283 Md. 334,

(Footnote continued on following page.)

more, the highest courts of several of these states have recently reaffirmed the continued vitality of the doctrine. *See, e.g. Alfree* v. *Alfree,* Del. Supr. 410 A.2d 161 (1979), *appeal dismissed,* ____ U.S. ____ 100 S.Ct. 2145 (1980); *Varholla* v. *Varholla,* 56 Ohio St.2d 269, 383 N.E.2d 888 (1978); *Raisen* v. *Raisen,* So.2d 352 (Fla.Sup.Ct. 1980).

B.

The Constitutionality Of The Illinois Statute Barring Interspousal Suits For Torts Has Consistently Been Upheld.

The constitutionality of the Illinois legislature's policy of interspousal immunity—as embodied in Ill. Rev. Stat., ch. 40, par. 1001—has been challenged several times; and on each such occasion the constitutionality of the statute has been upheld.

In the leading case of *Heckendorn* v. *First National Bank of Ottawa,* 19 Ill.2d 190, 166 N.E.2d 571, *cert. den.* 364 U.S.

(Footnote continued from preceding page.)

390 A.2d 77 (1978); *Ennis* v. *Truhite,* 306 S.W.2d 549 (Mo. 1957); *Apitz* v. *Dames,* 205 Or. 242, 287 P.2d 585 (1955); *Bounds* v. *Caudle,* 560 S.W.2d 925 (Tex. 1977).

In some states the doctrine has been abolished only with regard to torts arising from automobile accidents. *See Rupert* v. *Stienne,* 90 Nev. 397, 528 P.2d 1013 (1974); *Richard* v. *Richard,* 131 Vt. 98, 300 A.2d 637 (1973).

In Rhode Island interspousal tort immunity has been abrogated as applied to intentional torts, *Digby* v. *Digby,* 388 A.2d 1 (R.I. 1978), and as applied to actions brought after one or both spouses are dead, *Asplin* v. *Amica Mut. Ins. Co.,* 394 A.2d 1353 (R.I. 1978).

In Virginia the immunity has been abandoned for tort actions arising from automobile accidents, *Surratt* v. *Thompson,* 212 Va. 191, 183 S.E.2d 200 (1971), and for wrongful death actions in which the tortious act resulted in the termination of the marriage by death, *Korman* v. *Carpenter,* 216 Va. 86, 216 S.E.2d 195 (1975).

882 (1960), the Illinois Supreme Court upheld the constitutionality of the statute finding that it was not arbitrary and had the following rational basis:

> "Nor do we believe that the statutory proviso of 1953 violates the due process clauses of either the State or Federal constitutions, Const. art. 2, § 2; U.S. Const. Amend. 14. It is a legislative determination of public policy and a command to return to the basic common-law doctrine which immunized the husband from suits by his wife for a tort to her person. In *Brandt* v. *Keller,* 413 Ill. 503, 109 N.E.2d, 729, we held that by the adoption of the Married Women's Act of 1874, the legislature intended to abolish the common-law disability of a wife to sue her husband in tort. We there acknowledged that such action was in derogation of the common law and that the legislature thereby created a new right and remedy unknown to the common law.
>
> As it was within the power of the legislature to determine public policy and grant such right in 1874, it was also within its authority in 1953 to change this policy concept and to partially withdraw such right. *This it did by a proviso which applies equally to husband and wife and is consonant with a widely held view of public policy as enunciated in a majority of decisions in this country.* See: Annotation 43 A.L.R.2d 632.
>
> It is not our place to criticize the policy determination of the legislature. Nor need we surmise our decision had this case come before us in the absence of legislation. We are only concerned with the authority of the legislature to abolish or limit, by a nonarbitrary statute, a right unknown to common law, which it had previously created. In this case, where no rights had vested, we are neither aware of a constitutional ban, (*cf. Hall* v. *Gillins,* 13 Ill.2d 26, 147 N.E.2d 352; *Clarke* v. *Storchak,* 384 Ill. 564, 52 N.E.2d 229,) nor do we know of a court which has abolished the doctrine of marital disability in the absence of an applicable statute.
>
> We therefore conclude that the 1953 proviso of section 1 is valid and bars this action. The judgment of the trial

court is accordingly affirmed."[4] 19 Ill.2d at 194-195, 166 N.E.2d at 574 (emphasis added).

Although the Plaintiff's challenge in *Heckendorn* was on due process grounds, the Court's analysis applies equally well to Appellant Vogel's equal protection challenge.

The Illinois Supreme Court had another occasion to pass on the constitutionality of the challenged proviso in *Wartell* v. *Formusa,* 34 Ill.2d 57, 213 N.E.2d 544 (1966). Again, the statute was upheld and determined to be "a valid exercise of the legislature's power to enact legislation in furtherance of public policy and the general welfare of its citizens." 213 N.E.2d at 546.

Subsequent to *Heckendorn* and *Wartell,* Illinois Appellate Courts have upheld the constitutionality of paragraph 1001 on equal protection grounds on three separate occasions. *Steffa* v. *Stanley,* 39 Ill.App.3d 915, 350 N.E.2d 886 (1976); *Tyrken* v. *Tyrken,* 63 Ill.App.3d 199, 379 N.E.2d 804 (1978); *Vogel* v. *Robison,* 80 Ill.App.3d 312, 399 N.E.2d 688 (1980). The *Tyrken* court, relying on the reasoning in *Steffa* held as follows:

> "Plaintiff next contends that the Act violates the equal protection clauses of the Illinois Constitution and the United States Constitution because it discriminates against persons of the same class. A similar argument was raised in *Steffa* v. *Stanley* (2d Dist. 1976), 39 Ill.App.3d 915, 350 N.E.2d 886, where the court stated:
>
> > "Although the legislature may, in certain instances, classify persons for the purposes of legislative

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[4] The public policies discussed in Annotation 43 A.L.R.2d 632 and relied on by the Court in *Heckendorn* include the following: 1) preservation of domestic tranquility, 2) prevention of a deluge of spurious litigation, 3) protection of insurance companies from collusive suits, 4) ample protection is otherwise afforded the spouse through the criminal and divorce laws, and 5) danger such suits would unjustly reward the husband, since if the spouses were still living together the husband would share in the judgment. *See also* Annotation, Interspousal Tort Immunity, 92 A.L.R.3rd 901 (1979).

> regulation or control (*Youhas* v. *Ice,* 56 Ill.2d 497, 500, 309 N.E.2d 6 (1974)), the Act does not present us with the question of whether the classification of married women is constitutionally permissible. Its purpose was not to control or otherwise abridge the rights of married women but, rather, to allow rights denied under the common law and elevate married women to a legal parity with married men." (*Steffa,* at 918, 350 N.E.2d at 889.)
>
> The bar against tort actions between spouses during coverture applies equally to husband and wife and cannot therefore be said to violate plaintiff's right to equal protection." 379 N.E.2d at 935.6.

The Illinois Appellate Court in this case followed the decisions in *Steffa* and *Tyrken.* It is of particular significance that the Illinois Supreme Court denied petitions for leave to appeal from the appellate decisions in each of *Steffa, Tyrken* and *Vogel.*

C.

The Constitutionality Of The Interspousal Immunity Doctrine Has Been Upheld In All Other Jurisdictions Where It Has Been Challenged.

Every federal and state court which has had occasion to consider a constitutional challenge to the interspousal immunity doctrine has found that the doctrine is not constitutionally infirm. In *Locklair* v. *Locklair,* 256 F.Supp. 530 (D.S.C. 1966), the plaintiff, a South Carolina resident, sought to sue her husband as a result of injuries sustained in an automobile accident which occurred in Georgia. Georgia had retained the common law doctrine of interspousal tort immunity. The Court held that Georgia law applied and that the immunity doctrine was not constitutionally suspect, noting:

> "...[T]here is no discrimination nor denial of equal protection of the laws insofar as plaintiff is concerned,

inasmuch as the Georgia law applies equally to husbands as well as to wives." 256 F.Supp. at 533.

In *Paiewonsky* v. *Paiewonsky,* 466 F.2d 178 (3d Cir. 1971); *cert. den.* 405 U.S. 919 (1972), the Third Circuit Court of Appeals upheld the interspousal tort immunity doctrine of the Virgin Islands against a constitutional challenge. The plaintiff in *Paiewonsky,* like Appellant Vogel argued that the doctrine constituted a classification violative of the Equal Protection Clause of the Fourteenth Amendment. In rejecting that contention, the Court stated:

> "Since we have not been convinced that the immunity doctrine lacks substantial vitality, we think it follows that it has a reasonable relationship to the interest sought to be furthered by it. In sum, we believe that the legislative interest in promoting domestic tranquility is sufficiently compelling upon the facts of this case to support the classification in question." 466 F.2d at 182.

Alfree v. *Alfree,* Del.Supr., 410 A.2d 161 (1979), *appeal dismissed,* ____ U.S. ____, 100 S.Ct. 2145 (1980), involved issues identical to those presented by this case. The plaintiff wife brought suit against her husband for personal injuries arising out of an automobile accident. The trial court granted the husband's motion for summary judgment on the ground of the interspousal immunity doctrine. The plaintiff appealed and a three-justice panel of the Delaware Supreme Court affirmed. The Court granted plaintiff's motion for rehearing *en Banc* and *sua sponte* directed the parties to brief the question of whether the interspousal immunity doctrine violated plaintiff's due process or equal protection rights under the Fourteenth Amendment.

In a unanimous decision upholding the constitutionality of the common law doctrine, the Court analyzed the equal protection issue as follows:

> "Finally, as to the Federal due process and equal protection clauses, little law directly applicable has been

brought to our attention. The strongest precedent is *Paiewonsky* v. *Paiewonsky,* 3rd Cir., 446 F.2d 178, 181-182 (1971), cert. den., 405 U.S. 919, 92 S.Ct. 944, 30 L.Ed.2d 788 (1972). In that case, our former Chancellor, now Chief Judge Seitz of the Federal Circuit which includes Delaware, writing for the three judge panel, found no violation of equal protection in the alleged discrimination resulting from the doctrine of interspousal immunity. The Court said it "[had] not been convinced that the immunity doctrine lacks substantial vitality" and "it follows that it has a reasonable relationship to the [promotion of domestic tranquility] interest sought to be furthered by it." See also *Brawner* v. *Brawner,* Mo. Supr., 327 S.W.2d 808, 815 (1959). Other courts in rejecting equal protection claims have noted the doctrine applies to husbands as well as wives. See *Locklair* v. *Locklair,* D.S.C., 256 F.Supp. 530 (1960); *Smith* v. *Smith,* 240 Pa. Super. 97, 361 A.2d 756, 757 (1976).... Thus, based on current precedent, there appears to be no Federal constitutional limitation on the interspousal immunity doctrine. We so hold." 410 A.2d at 163.

The plaintiff then appealed to this Court on the federal equal protection and due process issues. As in this case, the plaintiff contended that the interspousal immunity doctrine was an impermissible burden on the right to marry. Plaintiff Alfree's appeal was dismissed on May 12, 1980 for want of a substantial federal question. ____ U.S. ____, 100 S.Ct. 2145 (1980). This appeal should be similarly dismissed.

D.

The Illinois Statute Barring Interspousal Suits For Torts Does Not Impermissibly Interfere With The Fundamental Right Of Marriage.

Appellant Vogel contends that the interspousal immunity doctrine embodied in Ill. Rev. Stat., ch. 40 par. 1001 impermissibly interferes with the fundamental right of marriage. Appel-

lant's support for this proposition is a rambling narrative that is virtually devoid of legal analysis.

This Court has recently considered the degree and content of permissible restrictions on the right to marry in *Califano* v. *Jobst,* 434 U.S. 47 (1977) and *Zablocki* v. *Redhail,* 434 U.S. 374 (1978). In *Jobst* this Court upheld certain sections of the Social Security Act which provided for the termination of a dependent child's benefits upon his marriage to an individual not entitled to benefits under the Act. Justice Stevens, applying a rational basis test, found that those provisions did not impose an undue burden upon the decision to marry:

> "Since it was rational for Congress to assume that marital status is a relevant test of probable dependency, the general rule which obtained before 1958, terminating all child's benefits when the beneficiary married, satisfied the constitutional test normally applied in cases like this. [Citations omitted]. That general rule is not rendered invalid simply because some persons who might otherwise have married were deterred by the rule or because some who did marry were burdened thereby. *For the marriage rule cannot be criticized as merely an unthinking response to stereotyped generalizations about a traditionally disadvantaged group, or as an attempt to interfere with the individual's freedom to make a decision as important as marriage.*
>
> The general rule, terminating upon marriage the benefits payable to a secondary beneficiary, is unquestionably valid." 434 U.S. at 53-54 (footnotes omitted) (emphasis added).

Zablocki was decided just two months after *Jobst.* In *Zablocki* this Court struck down a Wisconsin statute which provided that any resident having minor issue in his custody when he was under an obligation to support could not marry without court approval. Applying a strict scrutiny standard, Justice Marshall found the statute invalid because of the "direct and substantial" burden which it imposed upon the decision.

However, he recognized that strict scrutiny was not appropriate for all official decisions which might have some incidental effect upon the marriage relationship:

> "By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with the decisions to enter into the marital relationship may legitimately be imposed. See *Califano* v. *Jobst* [citations omitted]. The statutory classification at issue here, however, clearly does interfere directly and substantially with the right to marry." 434 U.S. at 386-7.

The *Zablocki* Court specifically distinguished *Califano* v. *Jobst*:

> "The directness and substantiality of the interference with the freedom to marry distinguish the instant case from *Califano* v. *Jobst* .... As the opinion for the Court [in *Jobst*] expressly noted, the rule terminating benefits upon marriage was not "an attempt to interfere with the individual's freedom to make a decision as important as marriage." ... The Social Security provisions placed no direct legal obstacle in the path of persons desiring to get married, and ... there was no evidence that the laws significantly discouraged, let alone made "practically impossible," any marriages. Indeed, the provisions had not deterred the individual who challenged the statute from getting married, even though he and his wife were both disabled." 434 U.S. at 387 n.12.[5]

The central teaching of *Zablocki* and *Jobst* is that strict scrutiny will be applied to a marriage-related law only when that law directly and significantly interferes with the decision to marry or the right of marriage; and for such an interference to be direct and significant, as in *Zablocki*, it must effectively bar

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[5] Similarly, the interspousal immunity doctrine did not deter Appellant Vogel from getting married.

marriage. In *Mapes* v. *United States,* 576 F.2d 896 (Ct. Cl. 1978), *cert. den.,* 439 U.S. 1046 (1978), a married couple challenged certain provisions of the Internal Revenue Code on the ground, *inter alia,* that married couples could not take advantage of the lower combined tax rates applicable to unmarried taxpayers. The Court of Claims, using a rational basis test, concluded that the challenged sections of the Internal Revenue Code did not impose an impermissible burden upon the right to marry under the Fifth Amendment:

> "Admittedly, the right to marry is a fundamental right. Nevertheless, we read the *Jobst* and *Zablocki* cases together to imply that the application of strict scrutiny is appropriate where the obstacle to marriage is a direct one, i.e., one that operates to preclude marriage entirely for a certain class of people, as in *Zablocki.* The effect of the rates of Code Section 1 is somewhat analogous to the effect of the termination of social security benefits in *Jobst*: the elevated tax burden might in fact dissuade some couples from entering into matrimony, but does not present an insuperable barrier to marriage." 576 F.2d at 901.

See also: Ensminger v. *CIR,* 610 F.2d 189, 192-94 (4th Cir. 1979); *Southwestern Community Action Council, Inc.* v. *Community Services Administration,* 462 F.Supp. 289 (S.D.W.Va 1978).

The interspousal tort immunity doctrine in no way interferes with the right to marry and is certainly not a preclusion of that right for some persons, as were the challenged laws in the cases cited by Appellant: *Zablocki, Loving* v. *Virginia,* 388 U.S. 1 (1967); and *Boddie* v. *Connecticut,* 401 U.S. 371 (1971). Appellant has produced no support for his bald conclusion that the immunity doctrine has impaired or interfered with anyone's right to marry. Indeed, it is extremely doubtful that the ability to sue one's spouse in tort enters the marriage decision making process at all. Consequently, the strict scrutiny test is not to be applied.

E.

The Illinois Statute Barring Interspousal Suits For Personal Torts Bears A Rational Relationship To Legitimate State Interests.

When viewed by other than the strict scrutiny standard, it cannot be said that the interspousal tort immunity doctrine lacks any rational basis or that it does not bear a substantial relation to legitimate state interests. As noted in Appellant's jurisdictional statement, some states have judicially abandoned the interspousal tort immunity doctrine. Illinois and a large number of other states, however, have found a rational basis for the doctrine and have chosen to retain it and to leave any changes to the will of the legislature. *Steffa* v. *Stanley,* 39 Ill.App.3d 915, 350 N.E.2d 886, 889 (1976); *Alfree* v. *Alfree,* Del. Supr., 410 A.2d 161 (1979), *appeal dismissed,* ____ U.S. ____, 100 S.Ct. 2145 (1980); *Thompson* v. *Thompson,* 218 U.S. 611 (1910); *Varholla* v. *Varholla,* 56 Ohio St.2d 269, 383 N.E.2d 888 (1978); *Raisen* v. *Raisen,* 379 So.2d 352 (Fla.Sup.Ct. 1980); *Martinez* v. *Lankster,* 595 S.W.2d 316 (Mo. 1980); *see generally,* Annotation, Interspousal Tort Immunity, 92 A.L.R. 3rd 901 (1979) and footnote 2 *supra.*

Appellant's entire argument that a rational basis for the statute no longer exists is premised on the Appellant's personal and speculative opinion concerning the current social and legal status of married and unmarried persons:

> "Aside from the right to share future acquisition of property and earnings, married persons stand before this court in exactly the same position as individuals who elect to cohabit without the formality of marriage." (Jurisdictional Statement at p. 19).
>
> * * *
>
> ". . . [T]here is now a social parity between married and unmarried couples." (Jurisdictional Statement at p. 20).

In a recent unanimous opinion the Illinois Supreme Court flatly rejected the propositions urged upon this Court by Appellant, and reaffirmed the sanctity of the marital relationship and the rights emanating therefrom. *Hewitt* v. *Hewitt,* 77 Ill.2d 49, 394 N.E.2d 1204 (1979). Describing marriage as "the foundation of our family-based society" the Court expressly declined to grant legal status to the relationship of unmarried cohabitants. Thus, contrary to the view of Appellant, married persons *do not* "... stand before this court in exactly the same position as individuals who elect to cohabit without the formality of marriage" (Jurisdictional Statement, p. 19).

Illinois law attributes many protective features to the marital relation which are not available to non-married persons, including the duty of support, the right to inherit, survival rights, rights to workmen's compensation, property rights and custody rights. *Hewitt* v. *Hewitt, supra,* 394 N.E.2d at 1207-08. In this context of special rights and disabilities flowing from the marital relation, it is rational for the State of Illinois to bar interspousal tort action as being a potential source of marital disharmony.

CONCLUSION

For all of the foregoing reasons, this appeal should be dismissed or the decision below affirmed because the appeal does not present a substantial federal question.

Respectfully submitted,

ANDREW J. O'CONOR
130 East Madison Street
Ottawa, Illinois 61350
(815) 434-6206

SANFORD R. GAIL
150 North Wacker Drive
Chicago, Illinois 60606
(312) 782-1905

Of Counsel:

A. BRUCE WHITE
150 North Wacker Drive
Chicago, Illinois 60606
(312) 782-1905

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